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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THICKER THAN WATER, INC., Plaintiff and Appellant, v. ASHOK K. SABHLOK, Defendant and Respondent.	A154064 (Contra Costa County Super. Ct. No. MSC15-00469)

Appellant Thicker Than Water, Inc.[1] appeals from an amended judgment and from an award of attorney fees and costs to Ashok K. Sabhlok ("Respondent"). We modify the judgment to reflect the correct amount of costs, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts relevant to the issues on appeal. In March 2015, Appellant asserted claims against Respondent including for breach of contract.[2] Respondent demurred to and moved to strike the complaint. The court sustained the

[1] In its notice of appeal, and in its opening and reply briefs, appellant refers to itself as Thicker Than Water, Inc., but it also states that in 2015 it changed its corporate name to Tiki Tom's USA, Inc. and that Thicker Than Water, Inc. "is now dissolved." We refer to this entity as "Appellant."

[2] The record on appeal does not contain a copy of Appellant's complaint or its various amended complaints. In summarizing the facts, we rely primarily on the trial court's register of actions, which is included in the record, and which identifies the plaintiff as "Tiki Tom's USA, Inc. [¶] FKA: Thicker Than Water, Inc."

demurrer with leave to amend. Respondent also demurred to and moved to strike the first amended complaint, but the hearings were vacated. In December 2016, Appellant filed a second amended complaint naming Tiki Tom's USA, Inc. as the plaintiff. In March 2017, the court sustained Respondent's demurrer to the second amended complaint without leave to amend. The court determined that "plaintiff Thicker Than Water, Inc."—Appellant here—was a suspended corporation that lacked the capacity to add or substitute a new plaintiff.[3]

On August 10, 2017, the court signed a judgment of dismissal. It was filed five days later, and it provides that Respondent was the prevailing party who could "recover costs and reasonable attorney fees per provision of the contract (master lease and sublease) as determined by the court." On October 13, 2017, Respondent mailed the notice of entry of judgment to Appellant.

On the same day, Respondent moved for an award of $19,745 in attorney fees and $1,658 in costs. Respondent attached his memorandum of costs as an exhibit to his motion for attorney fees, and he also separately filed it. The motion for attorney fees was scheduled to be heard on December 15, 2017. Appellant moved to tax and strike costs, which the court scheduled to be heard on January 26, 2018.

The court granted Respondent's motion for attorney fees. On January 2, 2018, the court signed an order awarding Respondent $19,745 in attorney fees and costs of $1,658. On January 18, 2018, the court entered an amended judgment of dismissal similar to the original judgment, but adding that the action was dismissed with prejudice, and specifying the amount of attorney fees and costs awarded to Respondent. On the same day, the court filed *two* orders awarding attorney fees and costs to Respondent. The first was the order the court signed on January 2, 2018. The second one, signed on January 11, 2018, stated Respondent was awarded attorney fees of $19,745, and "costs as stated in his memorandum of costs."

[3] Appellant does not challenge this ruling on appeal.

On January 26, 2018, at the hearing on the motion to tax and strike costs, the court reduced the award by $180, but otherwise denied the motion. The court's order, filed on February 13, 2018, states "An amended judgment shall issue to decrease Defendant's costs by $180.00." No second amended judgment was filed or issued.

On March 29, 2018, Appellant filed a notice of appeal from the amended judgment, from the order (or orders) awarding attorney fees and costs, and from the subsequent order on the motion to tax and strike costs.

DISCUSSION

On appeal, Appellant's main challenge is to the court's award of contractual attorney fees.[4]

I. *Appellant Fails to Show the Court Erred by Awarding Contractual Attorney Fees to Respondent*

Appellant challenges the court's award of attorney fees to Respondent under Civil Code section 1717, arguing there was no contract between the parties and the issue of a contractual relationship between Appellant and Respondent was never adjudicated on the merits.

"[T]o invoke [Civil Code] section 1717 and its reciprocity principles a party must show (1) he or she was sued on a contract containing an attorney fee provision; (2) he or she prevailed on the contract claims; and (3) the opponent would have been entitled to recover attorney fees had the opponent prevailed." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820.) In cases involving nonsignatories to a contract, " 'A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed.' " (*Id*. at pp. 819–820.)

[4] We reject Respondent's contention that the appeal is untimely. The original judgment dismissed the action without prejudice, but the amended one dismissed it with prejudice. As a result of this modification, the amended judgment superseded the original one. (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.) Neither Respondent nor the clerk mailed a notice of entry of the amended judgment.

In granting Respondent's motion for fees, the trial court found that Appellant alleged Respondent breached contractual obligations, that Respondent prevailed in the action, and that Appellant would have been entitled to attorney fees if it prevailed. The record on appeal does not contain a copy of the complaint, the amended complaints, or the contracts that formed the basis for the contract claims. Given Appellant's failure to include these documents in the record, we cannot determine whether the contracts included attorney fee provisions, or whether Appellant would or would not have been entitled to recover attorney fees if it prevailed. Therefore, we presume the court did not err in granting the motion. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609 ["a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error . . . . 'Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant].' "].)[5]

Moreover, courts can award contractual attorney fees even if the contract claims are not adjudicated on the merits because "A procedural victory that finally disposes of the parties' contractual dispute . . . may merit a prevailing party award of fees under section 1717." (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 981.) Here, Respondent prevailed on Appellant's contract claim because the court sustained his demurrer to the second amended complaint without leave to amend and dismissed the case with prejudice. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 ["When a party obtains a simple, unqualified victory by completely . . . defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in . . . defense of those claims."].)

[5] We reject Appellant's spurious contention in its reply brief that Respondent should have sought to augment the record.

II. *The Unclean Hands Doctrine Does Not Apply*

Appellant contends the trial court should not have awarded Respondent attorney fees or costs because he had "unclean hands" and engaged in "bad faith litigation tactics." We reject the argument.

"Generally, the equitable doctrine of unclean hands applies when a plaintiff has acted unconscionably, in bad faith, or inequitably in the matter in which the plaintiff seeks relief. [Citations.] ' "The misconduct which brings the clean hands doctrine into operation must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants." ' [Citation.] If the required showing is made, unclean hands may be a complete defense to legal as well as equitable causes of action." (*Salas v. Sierra Chemical Co*. (2014) 59 Cal.4th 407, 432.)

Here, there is no indication the court made any findings regarding Respondent's "unclean hands" or whether he engaged in bad faith litigation tactics. On appeal, Appellant repeats arguments made in opposition to Respondent's motion for attorney's fees. The trial court stated these arguments were irrelevant, and "If plaintiff thinks the result ordered by Judge Spanos [who ruled on the demurrer] is incorrect, it knows where to find the Court of Appeal." However, Appellant "is not appealing the demurrer or the Court's decision to ban it from continuing the case . . . ." We are not persuaded that Appellant can invoke the unclean hands doctrine to argue the trial court should not have awarded attorney fees or costs to Respondent.

III. *The Costs Award Was Not an Abuse of Discretion*

Appellant challenges the amount of costs awarded to Respondent. The prevailing party "is entitled as a matter of right to recover costs . . . ." (Code Civ. Proc., § 1032, subd. (b).) "A costs award is reviewed on appeal for abuse of discretion," and it should not be disturbed unless it is clearly wrong. (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc*. (2007) 150 Cal.App.4th 612, 617.)

The court reduced Respondent's award by $180, but otherwise denied Appellant's motion to tax and strike costs. At the hearing, the court explained it disallowed costs

associated with the fee for a motion to be relieved as counsel. It was not an abuse of discretion for the court to permit Respondent to recover his remaining filing fees. Nor are we persuaded the court should have struck Respondent's remaining costs, most of which were incurred demurring to, or otherwise responding to, Appellant's complaints.

Nonetheless, based on the court's decision to reduce Respondent's costs by $180, a new judgment reflecting the change should have issued. Accordingly, we modify the amended judgment to provide that Respondent is awarded costs of $1,478, which is $180 less than the costs he requested. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [" 'Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination. [Citations.]' [Citations.]"].)

IV. *Appellant's Remaining Arguments Fail*

Appellant contends the court should not have signed proposed orders and judgments that included Respondent's "own determinations and version of facts." Appellant implies the court prematurely determined Respondent was the prevailing party, and determined he was entitled to attorney fees and costs without a proper showing or hearing.

These arguments are meritless. The court held a hearing on Respondent's motion for attorney fees before granting it. The court also held a hearing on Appellant's motion to tax or strike costs before reducing the award. This case was dismissed with prejudice, and, as a result, Respondent was the prevailing party for purposes of both a cost award and contractual attorney fees. (Code Civ. Proc., § 1032, subd. (a)(4); *Scott Co. v. Blount, Inc.*, *supra*, 20 Cal.4th at p. 1109.) Thus, Appellant suffered no harm or prejudice from the court's inclusion of Respondent's "own determinations" in proposed orders and judgments.

Appellant contends it was improper for the court to prevent a court reporter from recording the hearing on Respondent's motion for attorney fees. Once again, if there

was error, Appellant fails to articulate any harm or prejudice. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107–1108 [no reversal absent prejudicial error].) At the end of his brief, Respondent requests that we sanction Appellant. We deny the request.

DISPOSITION

We modify the amended judgment of dismissal to provide that Respondent Ashok K. Sabhlok is awarded attorney fees of $19,745 and costs of $1,478. We otherwise affirm. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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Jones, P.J.

WE CONCUR:

_____
Simons, J.

_____
Needham, J.

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